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NO. 82-6876

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ROBERT KUBAT,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ of Certiorari To The
Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether petitioner's failure to properly raise two of his issues in the courts below renders them beyond this Court's jurisdiction.

II. Whether the court below correctly held that the identification testimony was reliable and, therefore, admissible.

III. Whether the Illinois Death Penalty Act provides the sentencing authority with adequate guidance when determining whether or not the sentence of death should be imposed.

IV. Whether the specific statutory aggravating and mitigating factors of the Illinois Death Penalty Act provides the State with sufficient standards to select those prosecuted for capital offenses.

V. Whether the Illinois Death Penalty Act ensures meaningful appellate review.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

On January 24, 1983, the Illinois Supreme Court filed an opinion affirming petitioner's convictions and sentence of death. The case is reported at 94 Ill. 2d at 437.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3). However, as treated more fully below, respondent submits that this Court lacks jurisdiction to entertain certain questions presented by petitioner for review. Nor does respondent believe that petitioner has shown any reason for this Court to exercise its sound discretion to grant his Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are contained in the Petition for a Writ of Certiorari at 2-5.

STATEMENT OF FACTS

The opinion of the Illinois Supreme Court, reported at 94 Ill. 2d 437, fully sets forth facts relevant to consideration of the petition and brief in opposition.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S FIRST TWO QUESTIONS MAY NOT BE CONSIDERED BY THIS COURT, AS THEY HAVE BEEN WAIVED. [Responds to Petitioner's Issues A and B.]

Rule 21.1(h) of the Rules of the Supreme Court of the United States provides, in pertinent part, as follows:

> Rule 21.1. The Petition for Certiorari
>
> (h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion or court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. (emphasis added)

The petitioner's first two issues presented to this Court involve questions concerning jury instructions. Specifically, his first issue asks whether or not the trial court was under a duty to instruct the jury sua sponte on a lesser included non-capital offense, despite the fact that petitioner did not request such an instruction. Petitioner's second issue is whether an improper instruction given to the jury during petitioner's sentencing hearing conflicts with this Court's holdings on the subject. The State of Illinois maintains, as it did in the Illinois Supreme Court, that these claims were waived and, therefore, this Court is without jurisdiction to review these claims.

It is perhaps the most fundamental principle of constitutional adjudication in this Court that the questions to be decided must have been raised and properly preserved below. United States v. Ortiz, 422 U.S. 891 (1975); Tacon v. Arizona, 410 U.S. 351 (1973). Indeed, the requirement that the question

to be decided must have been properly raised or passed upon in the highest state court to review the case is jurisdictional. Cardinale v. Louisiana, 394 U.S. 437 (1969); 28 U.S.C. § 1257; Sup. Ct. R. 21.1(a). Since petitioner did not tender to the trial court an instruction on the lesser included offense the issue was waived. Likewise, petitioner's claim that one of the jury instructions at his sentencing hearing was improper was also waived, as there was no objection to the instruction.

The Illinois Supreme Court reviewed both of these claims under Illinois Supreme Court Rule 615(a) because they were waived. Rule 615(a) states:

> Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court. (emphasis added)

Ill. Rev. Stat., 1981, ch. 110A § 615(a).

On the issue of whether the trial court erred in failing to instruct the jury sua sponte on the lesser included offense, the Illinois Supreme Court stated:

> It is well settled that the burden of preparing jury instructions is primarily on the parties, not the trial court; and as we have indicated, with limited exceptions the trial court is under no obligation to give jury instructions not requested by counsel. (cites omitted) This is true in capital cases as well as other criminal proceedings.
>
> * * *
>
> Defendant does not dispute the fact that the evidence supported a finding of guilty of aggravated kidnapping if the defendant was found to be the abductor. . . . We consider that under the circumstances here where the defendant submitted alibi evidence and did not request a lesser included instruction, and the case was not close factually, the trial judge was under no obligation to sua sponte instruct the jury on the lesser included offense; the failure to do so did not constitute plain error or result in an unfair trial. (emphasis added)

People v. Kubat, 94 Ill. 2d 437, 486, 487, 447 N.E.2d 247 (1983). Thus, not only did the Illinois court consider the issue waived, it made a specific determination that the failure to instruct was not plain error.

Concerning the improper jury instruction during the sentencing hearing the Illinois Supreme Court stated:

> [D]espite the failure to object to an instruction, this court will take notice of errors which deprive a defendant of his constitutional rights, the giving of an erroneous instruction does not necessarily constitute a denial of due process of law. (cite omitted) This court has corrected "grave" errors in trial instructions despite the lack of an objection (cite omitted), and refused to apply the waiver rule where the case was close factually and fundamental fairness required that the jury be properly instructed. (cite omitted) Here, however, we find no fundamental unfairness. No mitigating evidence had been offered, presumably because little was available, and the jury had no factual disputes to resolve. There is no indication that the jury was in any way confused. The alternative verdict form was clear and simply drafted. . . . (emphasis added)

94 Ill. 2d at 492. Again, the Illinois court not only considered the issue waived but also decided that the giving of the instruction was not plain error.

As petitioner procedurally defaulted on preserving his claims in the state trial court, the issues were waived in the Illinois Supreme Court. For this reason petitioner's Issues A and B are waived before this Court and, therefore, this Court lacks jurisdiction to consider them. Ortiz, supra; Tacon, supra; Cardinale, supra; Sup. Ct. R. 21.1(h).

II.

> THE ILLINOIS SUPREME COURT PROPERLY ASSESSED THE IDENTIFICATION TESTIMONY OF THE STATE'S WITNESSES AND ITS HOLDING THAT SUCH TESTIMONY WAS RELIABLE IS IN ACCORD WITH THE DECISIONS OF THIS COURT. [Responds to Petitioner's Issue C.]

In the case at bar the police conducted several photographic arrays with witnesses Sandra Lawson, Jesse Lopez and Nora Lopez. The Illinois Supreme Court, in deciding the issue, found that none of the arrays were impermissibly suggestive, and, therefore, did not deprive petitioner of any constitutional right, but the court did hold that subsequent photographic arrays were improper because a line-up could have been conducted.

In Simmons v. United States, 390 U.S. 377, 384 (1968), this Court examined the employment of photographs by police as a means of identifying criminals, and stated it was "unwilling to prohibit its employment, either in the exercise of our supervisory power, or, still less, as a matter of constitutional requirement." This Court further held that:

> [E]ach case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

390 U.S. at 384.

After noting initially that the first photographic array was indispensable to the investigation of the case and the unfeasibility of a lineup, the Illinois Supreme Court, quoting Simmons, held that, "Nor do we believe that the first photographic array was so 'impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" People v. Kubat, 94 Ill. 2d 437, 472, 447 N.E.2d 634 (1983). Turning to the subsequent photographic arrays, the court noted that the fact that they were not inherently suggestive was not in dispute and then stated that since a lineup could have been conducted, it was improper, under Illinois law, to again use the photographic identification technique. See People v. Holiday, 47 Ill. 2d 300, 265 N.E.2d 634 (1970). However, the court held that any impropriety did not affect in-court identifications made by the witnesses. 94 Ill. 2d at 472.

The Illinois Supreme Court then turned to the question of whether or not the identification testimony was reliable. The court noted that this question was controlled by the cases of Manson v. Brathwaite, 432 U.S. 98 (1977) and Neil v. Biggers, 409 U.S. 188 (1972). In holding that the identification testimony of the three witnesses was reliable and, therefore, admissible against petitioner, the Illinois court held that:

> Both Jesse and Nora Lopez had an excellent opportunity to view defendant at the time for which their testimony was sought--to corroborate Quick's testimony concerning the couple's whereabouts in Wisconsin on November 2, 1979. Mr. Lopez conversed for more than 20 minutes at close range with defendant during a "slow" time at his bar, and Mrs. Lopez was present during the conversation. Both witnesses, while occupying themselves with routine tasks during the conversation, were attentive during the conversation. Indeed, their degree of attention was heightened due to defendant's and Quick's friendliness, coupled with the fact that they were strangers in a bar frequented almost exclusively by a regular clientele. Although the witnesses were not asked to supply a description of defendant, both of them positively identified the defendant's picture from an array which was not at all suggestive. Because the photograph of defendant used during the initial interviews was of such poor quality, the fact that the witnesses were less certain when identifying that photograph does not reflect adversely on the reliability of the subsequent positive photographic and in-court identifications. We accordingly conclude that the in-court identifications made by the Lopezes were clearly reliable and therefore properly admitted. People v. McTush (1980), 81 Ill. 2d 513.
>
> The question asked of Sandra Lopez during trial was whether she saw anybody in the courtroom "who looks like" the man who was in the bar on November 2, 1979. She identified defendant. We consider that that testimony as well as her prior tentative photograph identification was relevant to the weight to be accorded her identification. (See People v. Allender (1977), 69 Ill. 2d 38, 44.) The circumstances were such as to indicate that she, too, could have made a reliable in-court identification. The fact that she did not make a positive identification did not render her testimony inadmissible.

94 Ill. 2d at 474-75.

It is clear that the Illinois Supreme Court ruling on the identification testimony was in accord with this Court's decisions in Simmons, supra; Manson, supra; and Neil, supra, and since no constitutional issue has been presented, certiorari should not be granted.

III.

THE ILLINOIS DEATH PENALTY ACT WHICH ALLOWS ALL RELEVANT AGGRAVATING FACTORS TO BE CONSIDERED AT THE SECOND PHASE OF A SENTENCING HEARING IS NOT VIOLATIVE OF THE EIGHTH AMENDMENT. [Responds to Petitioner's Issue D.]

Under the Illinois Death Penalty Act the judge or jury must first determine whether the State has proved a statutory aggravating factor beyond a reasonable doubt before it proceeds to weigh aggravating and mitigating factors and to make its decision whether or not to sentence a defendant to death. Ill. Rev. Stat., 1979, ch. 38, §§ 9-1(g),(h); See People v. Free, 94 Ill. 2d 378, 447 N.E.2d 218 (1983).

The Illinois two-stage hearing is the ideal method for steering a course between the dangers of a too broad discretion in determining whether the defendant is eligible for the death penalty, Ill. Rev. Stat., 1979, ch. 38, § 9-1(f), and a too limited discretion in considering additional factors in aggravation and mitigation. Ill. Rev. Stat., 1979, ch. 38, § 9-1(e). This Court has condemned state statutes for failing to limit or channel discretion, Furman v. Georgia, 408 U.S. 238 (1972), and it has condemned state statutes for failing to provide the jury with sufficient discretion, Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). The Illinois statute accommodates these two potentially conflicting considerations by strictly limiting discretion when it is necessary to do so. When the jury determines whether a defendant is eligible for the death penalty, it can only consider evidence relative to the seven statutorily-defined aggravating factors and it is required to find such factors beyond a reasonable doubt. See § 9-1(b), (d), (f). But when it is necessary that the jury's discretion be broadly construed, i.e., in the determination of whether there are sufficient mitigating factors to preclude the imposition of the death sentence, the statute properly allows the jury to consider additional relevant evidence, both in aggravation and in mitigation. See § 9-1(c), (e), (g).

This Court in its recent decision in Barclay v. Florida, ___ U.S. ___, 32 Cr. L. 3292, 3295 (1983) held that:

> Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences. The thrust of our decisions on capital punishment has been "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens, ___ U.S. ___, 11 (1983), quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). This very Term we said in another capital case:
>
> > "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstances, the jury then is free to consider a myriad of factors to determine whether or not death is the appropriate punishment." California v. Ramos, ___ U.S. ___, 14 (1983).

It is clear that the Illinois Death Penalty Act comports with this Court's decisions. The jury is allowed to consider any aggravating factor, as well as any mitigating factor, which bears on the character and person of the defendant, in deciding whether the sentence of death should be imposed, but only after first determining beyond a reasonable doubt that the individual is eligible for the death sentence.

Inasmuch as the Illinois statute suitably directs and limits the jury's discretion and comports with this Court's decisions on the issue, no constitutional issue is raised and certiorari should not be granted.

IV.

WHERE A DEATH PENALTY STATUTE PROVIDES STANDARDS THAT SUFFICIENTLY FOCUS ON THE PARTICULARIZED CIRCUMSTANCES OF THE CRIME AND THE DEFENDANT, THE DISCRETION OF THE PROSECUTOR TO REQUEST THE DEATH PENALTY OR SHOW MERCY DOES NOT RESULT IN THE ARBITRARY IMPOSITION OF CAPITAL PUNISHMENT. [Responds to Petitioner's Issue E.]

The petitioner contends that the Illinois Death Penalty Act is invalid on its face because it lacks necessary

standards to assure its evenhanded application by prosecutors across the State of Illinois. However, when the statute is analyzed, it is clear that the specific statutory aggravating and mitigating factors provide sufficient standards to prevent the uneven imposition of capital sentences.

This Court, in Gregg v. Georgia, 428 U.S. 153 (1976), rejected an argument that prosecutors had "unfettered authority" to select those prosecuted for capital offenses. In upholding the discretion to show mercy at any stage of the proceedings, this Court stated that:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy, violates the Constitution. Furman [Furman v. Georgia, 408 U.S. 238 (1972)] held only that in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

428 U.S. at 199. In Gregg, the Georgia prosecutor's power to charge a capital offense was confined by the statutory definition of that offense, with the decision depending upon his estimate of what testimony and other evidence would be available and its persuasive effect.

Despite the petitioner's contention, the enumerated statutory aggravating and mitigating factors provide Illinois prosecutors with sufficient standards by which to make the decision to request, or not request, a death penalty hearing. A murder can be a capital offense only if it falls within one of the statutorily defined classes. Ill. Rev. Stat. 1979, ch. 38, § 9-1(b). The statutory mitigating factors, See § 9-1(c), must be the starting point for any decision to show mercy. Even when the prosecutor requests a death penalty hearing in the case of a particular defendant, a judge or jury must conduct the statutorily prescribed hearing, and consider the statutorily prescribed standards in determining whether or not the death penalty should be imposed. Moreover, the Illinois

prosecutor's judgment will be better informed than under the Georgia procedure approved in Gregg, "for he need not make the final decision until after the conclusion of trial, when he will have evaluated the testimony and other evidence which was in fact presented." People ex rel. Carey v. Cousins, 77 Ill. 2d 531, 397 N.E.2d 809, 815 (1979), cert. denied, 445 U.S. 953 (1980).

The petitioner asserts that prosecutors will exercise their discretionary power to request the death penalty not only arbitrarily, but maliciously, owing to personal or local community prejudices. However, as a matter of federal constitutional law, the concurring opinion of Justices White, Burger and Rehnquist in Gregg, is instructive:

> Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt.

428 U.S. at 224-25.

If the prosecutor does not have the discretion to choose which defendants should be considered for the death penalty upon conviction, the State is left with two alternatives. The first would be to simply abolish capital punishment in Illinois, despite the fact that the Constitution does not require such abolition (Gregg, 428 U.S. at 187) and without regard to the will of the people of this State as expressed by their elected representatives, who drafted the Death Penalty Act. The other alternative would be to totally

remove all elements of prosecutorial discretion in the sentencing of convicted murderers by making capital punishment the mandatory penalty for certain offenses, an alternative already condemned by this Court as unconstitutional. Roberts v. Louisiana, 428 U.S. 325 (1976).

The Illinois Death Penalty Act serves as a practical, just, and constitutional compromise between these extreme positions. It fulfills the need for standards mandated by Furman and Gregg by requiring the sentencing authority to focus on the particularized circumstances of the crime and the individual defendant. The granting of mercy to individual defendants at any stage of the proceedings does not violate the Eighth and Fourteenth Amendments.

V.

DIRECT REVIEW OF DEATH SENTENCES BY THE SUPREME COURT OF ILLINOIS PREVENTS CAPITAL PUNISHMENT FROM BEING ARBITRARILY IMPOSED AND PROVIDES MEANINGFUL APPELLATE REVIEW. [Responds to Petitioner's Issue F.]

The petitioner also contends that the Illinois appellate review procedures for death penalty cases are inadequate because the death penalty statute does not provide for comparison review or assure that the proper factors of aggravation and mitigation will be disclosed by the record. However, direct review of all capital cases to the Supreme Court of Illinois and the availability of the entire trial court record for that court's consideration ensures meaningful appellate review.

The appropriate inquiry when analyzing a state appellate review procedure is whether that process "serves as a check against the random or arbitrary imposition of the death penalty." Gregg, 428 U.S. at 206. Prompt judicial review afforded by a court with statewide jurisdiction provides "a means to promote the evenhanded, rational and consistent imposition of sentences." Jurek v. Texas, 428 U.S. 262, 276 (1976); See also, Profitt v. Florida, 428 U.S. 242, 258-259 (1976).

The Illinois Constitution, art. IV, § 4(b); the Death Penalty Act, (Ill. Rev. Stat. 1977, ch. 38, § 9-1(i)); and Supreme Court Rule 603, Ill. Rev. Stat. 1979, ch. 110A, § 603, all provide for direct appeal to the Supreme Court of Illinois of any conviction for which the death penalty has been imposed. The entire trial court record is available to the reviewing court for examination, Supreme Court Rule 342(d), (Ill. Rev. Stat. 1979, ch. 110A, § 342), thus disclosing the evidence which motivated the imposition of the death sentence.

The petitioner cannot complain that he does not know what factors the sentencing authority considered in imposing punishment. The transcript of the trial and sentencing hearing provided the Supreme Court of Illinois with a full opportunity to determine if the proper mitigating and aggravating factors were correctly applied by the sentencing authority.

Finally, the petitioner's fears that the arbitrary and capricious imposition of the death penalty may escape the attention of the Supreme Court of Illinois is belied by that court's own experience in capital cases. On frequent occasion, the court has detected some defect in the record of a capital case which resulted in the vacation or outright reversal of a death sentence. See People v. Tiller, 94 Ill. 2d 303, 447 N.E.2d 174 (1983) (death sentence reversed because requisite intent not shown); People v. Devin, 93 Ill. 2d 326, 444 N.E.2d 102 (1982) (death sentence vacated for improper consideration of aggravating factor); People v. Walker, 84 Ill. 2d 512, 419 N.E.2d 1167 (1981) (death sentence vacated because defendant was misinformed of the maximum penalty before pleading guilty); People v. Gleckler, 82 Ill. 2d 145, 411 N.E.2d 849 (1980) (death penalty reversed because disproportionate); People v. Carlson, 79 Ill. 2d 564, 404 N.E.2d 233 (1980) (death sentence reversed where record demonstrated that defendant did not have a "malignant heart"); People v. Brownell, 79 Ill. 2d 508, 404 N.E.2d 181 (1980) (death penalty vacated after improper

consideration of aggravating factor). These decisions conclusively demonstrate that the Supreme Court of Illinois has never abdicated its constitutional responsibility in capital cases to ensure ..e fair and even-handed imposition of the death penalty.

CONCLUSION

For the foregoing reasons, the respondent requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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